

**Michael N. Milby, Clerk**



In their original challenge to the sufficiency of the Plaintiff's Consolidated Complaint ("Consolidated Complaint"), the Officer Defendants argued that the allegations against them did not satisfy the "particularity" requirements of federal securities cases. In denying those motions, the Court relied on material outside of the Complaint and invited the Plaintiff to amend the Consolidated Complaint. The Court also "inferred" critical allegations not stated in the Consolidated Complaint, using a general allegation in the Consolidated Complaint as a reference point. The Court wrote that it was not "amending" Plaintiff's complaint to add those allegations but was granting Plaintiff leave to add them. In effect, the Court invited the Plaintiff to support the Court's interpretation of

15/09

Plaintiff's general allegation by adding certain specific allegations in an amended complaint. Plaintiff has now filed the First Amended Complaint, but it has not incorporated the materials on which the Court relied, and it has not supported the Court's interpretation of its existing general allegations. Plaintiff's First Amended Complaint suffers, therefore, from the same defects as Plaintiff's Consolidated Complaint and clearly fails to meet the pleading requirements of the PLSRA and Rule 9 of the Federal Rules of Civil Procedure.

Because the First Amended Complaint is, at least with regards to the Officer Defendants, largely a reiteration of the Consolidated Complaint, their Motions to Dismiss repeat and incorporate the arguments from the respective Motions to Dismiss and Reply to Opposition that were filed in connection with that Complaint<sup>1</sup>. The principal defect of the Amended Complaint -- and thus the principal argument of this Motions to Dismiss -- is the same as the principal defect of the Consolidated Complaint and the first round of Motions to Dismiss -- namely, the failure of Plaintiff to meet universally recognized requirements of particularized allegations as to each Defendant, relying instead on thoroughly discredited group pleading. In large part thier Motions to Dismiss are a reprise of the earlier Motions, which the Court denied based on the "totality of the circumstances." Under the Fifth Circuit case law and the PSLRA, "totality of the circumstances" does not override the requirement of particularized allegations, just as there is no Enron exception to the PSLRA.

It is fundamental that matters outside the complaint cannot be used to fill in gaps or

---

<sup>1</sup>Although the motions for the eight Officer Defendants is filed as a single document, it is intended as individual motions on behalf of each. The incorporated motions are *Newby* Docket Entries 637, 641, 642, 643, 644, 646, 656, 657, 735, 740, 918, 921 and 1318. Throughout this motion the abbreviation "D.E." will be referred to when citing *Newby* Docket Entries.

deficiencies of the Complaint in response to a Rule 12(b)(6) Motion to Dismiss.<sup>2</sup> After all, it is the live Complaint that defines the Plaintiff's case, *i.e.*, that defines what it is that the Defendants must defend and what it is that the Court must adjudicate. Thus, one surely would have expected – indeed, it is highly likely that the Court expected – Plaintiff to include within its Amended Complaint the matters the Court referred to in its various Orders on the first round of Motions to Dismiss. As to some matters, the Court even gave Plaintiff remarkably detailed and explicit guidance on what should be included in the Amended Complaint. By and large, however, Plaintiff has not included any new allegations or significantly repleaded its claims against the Officer Defendants.<sup>3</sup> So, in the interest of justice, we ask the Court's indulgence to consider the effect of Plaintiff's inaction on the Court's instruction to replead and to consider again that alleged membership on a Management Committee *does not satisfy* Plaintiff's burden to plead "what actions each Defendant took in furtherance of the alleged scheme and specifically plead what he learned, when he learned it, and how Plaintiff knows what he learned."

What makes Plaintiff's failure to amend its Complaint in response to the Court's suggestions even more abject is that it comes after an additional year in which to conduct whatever investigations Plaintiff deemed appropriate and unprecedented access to millions of pages of discovery relating to the demise of Enron. Plaintiff readily acknowledges that it is "master" of its Complaint.<sup>4</sup> At this stage, after another year and considerable guidance from the Court, Plaintiff can and should be held

---

<sup>2</sup> See *e.g. Fonte v. Board of Managers Continental Towers Condominium*, 848 F. 2d 24, 25 (2d Cir. 1988).

<sup>3</sup> The exception is new allegations against Cindy Olson which are discussed in part II D below.

<sup>4</sup>See Opposition to Sutton's Motion to Reconsider, D.E. 1371 at 2.

accountable for what the Amended Complaint contains and *what it does not*. Accordingly, as to the claims asserted against the Officer Defendants that are the subject of this Motion, the Motion should be granted *with prejudice*.

**I. LEAD PLAINTIFF RELIES ALMOST EXCLUSIVELY ON GROUP AND POSITION ALLEGATIONS.**

**A. Under Leading Fifth Circuit Law, The Amended Consolidated Complaint Fails to State a Claim.**

In *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860, 886 (S.D. Texas 2001), this Court wrote: “Plaintiffs must allege what actions *each Defendant* took in furtherance of the alleged scheme and *specifically plead* what he learned, when he learned it, and how Plaintiffs know what he learned.” (Emphasis added) That remains an excellent succinct statement of the law with regard to the particularity requirement of pleadings securities fraud under the PSLRA, especially with regard to pleading sufficient facts *as to each defendant* sufficient to raise a strong inference of scienter, as illustrated by the four major Fifth Circuit decisions since *BMC Software* was written that address the matter – *Nathenson v. Zonagen, Inc.*, 267 F.3d 400 (5<sup>th</sup> Cir. 2001); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336 (5<sup>th</sup> Cir. 2002); *Abrams v. Baker Hughes Inc.*, 292 F.3d 424 (5<sup>th</sup> Cir. 2002); and *Rosenzweig v. Azurix Corp.*, No. 02-20804 (5<sup>th</sup> Cir. June 13, 2003).

In *Nathenson* the Fifth Circuit held that “the necessary strong inference of scienter” was pled as to one individual company officer, rather than a group of officers. *Nathenson*, 267 F. 3d at 424-25. That one officer was the CEO of the company, the company was relatively small (about 35 employees), it was “essentially a one product company.” That one product depended on patent protection, the critical alleged misrepresentation involved the patent status of that single product, and it was the CEO who had made the statement at issue. *Id.* at 425. The Fifth Circuit held that all of

those factors taken together “suffice[d], if perhaps only barely so,” to support a strong inference of scienter on the part of the CEO (but not as to two other defendants). *Id.* The “totality of circumstances” that the Fifth Circuit considered to support the inference of scienter *included* particularized allegations as to the CEO concerning what he knew, when he knew it, and what he said (namely, the crucial alleged misstatement). *See generally, Nathenson*, 267 F. 3d 400.

*ABC Arbitrage* summarized the particularized pleading requirements under the PSLRA as the ““who, what, when, where, and how”” of securities fraud jurisprudence. 291 F.3d at 350 (citation omitted). It also underscored that Rule 9(b) requirements also are applicable: “[A]rticulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.” *Id.* at 349 (citation omitted).

In *Abrams*, the Fifth Circuit cited *Nathenson* in noting that allegations should not be read in isolation, but rather all facts and circumstances “taken together” must be considered. 292 F.3d at 431. And then the Court proceeded to do just that in analyzing the claims against two senior level executives of Baker Hughes, one of whom was the president, chairman, and chief operating officer and the other chief financial officer. *See id.* at 427. The Fifth Circuit noted that, among other things, the plaintiff had alleged that the defendants “were intimately familiar with the inner workings of the company, including the inadequacies of its internal controls,” and that both had “received unidentified daily, weekly and monthly financial reports that apprized them of the company’s true financial status. . . .” *Id.* at 431-32. These allegations were *not* sufficiently

particularized to raise a strong inference of scienter.<sup>5</sup> Of particular relevance to this case was the Court's observation that "[a] pleading of scienter may not rest on the inference that defendants must have been aware of the misstatement based on their positions within the company." *Id.* at 432.<sup>6</sup>

Finally, last Friday, June 13<sup>th</sup>, the Fifth Circuit issued its opinion in *Azurix*, in which the District Court (Judge Lake) had dismissed, with prejudice and without leave to amend, securities fraud claims against six former Enron and Azurix officers and directors. On appeal, the principal allegations that Plaintiff urged to support the sufficiency of their Complaint with regard to scienter was something called the "Wasserstein report," which Enron had commissioned in connection with a December 2000 re-purchase of the public shares of Azurix. *See Rosenzweig*, slip op. at 4-5. The Fifth Circuit held that even if it gave the Wasserstein report the "strained reading" that plaintiff urged, "the allegations are not sufficiently particular."

The report describes the problems with Azurix in generalized terms, and, more importantly, it fails to identify exactly who supplied the information or when they knew the information. These statements fall far short of "the 'who, what, when, where, and how' required under 9(b) and [the Court's] securities fraud jurisprudence under the PSLRA."

*Rosenzweig*, slip op. at 20 (internal citations omitted). The Fifth Circuit affirmed the dismissal of

---

<sup>5</sup>As the Court explained:

The plaintiffs' allegations regarding *non-specific internal reports* are also inadequate. An unsupported general claim about the existence of confidential corporate reports that reveal information contrary to reported accounts is insufficient to survive a motion to dismiss. Such allegations must have corroborating details regarding the contents of allegedly contrary reports, their authors and recipients.

*Id.* at 432 (emphasis added).

<sup>6</sup>The same certainly goes for "non-specific internal" Management Committee meetings.

the case, with prejudice. “If the plaintiff does not plead facts giving rise to a strong inference of scienter, the PSLRA directs that the district court ‘shall . . . dismiss the complaint.’” *Rosenzweig*, slip op. at 17 (citing 15 U.S.C. § 78u-4(b)(3)(A)). Likewise, it is the “who, what, when, where, and how” that is missing from the *Newby* Amended Complaint, at least with regard to the Officer Defendants. This Court recognized that it was missing from the Original Complaint as to James V. Derrick, Jr.<sup>7</sup> and Rebecca Mark-Jusbache<sup>8</sup> (even though they too were alleged to have been members of the Management Committee, see Consolidated Complaint, ¶ 88). The Court should acknowledge the essential particularized allegations are also lacking as to the Officer Defendants. There are no alleged misstatements attributed to any one individual Officer Defendant. There are no allegations that any of them voted on or approved any specific allegedly fraudulent transaction. There are no allegations that any one of them knew specific material non-public information and then took or failed to take specific action. There are not even any allegations that any one of the Officer Defendants was present at any given meeting (*including any Management Committee meeting*) where any allegedly fraudulent transaction was discussed, much less approved.

---

<sup>7</sup>D.E.1347 at 32-36, granting Mr. Derrick’s Motion to Dismiss. The Court wrote:

No specifics are provided about each’s role, or how, when, where, why and what was not disclosed. Clearly such pleading will not satisfy the PSLRA.

*Id.* at 36. The Court then attempted to distinguish other insiders by referring to their “day-to-day personal participation in the business operation of Enron,” but Plaintiff does not allege any such personal participation with any specificity as to the Officer Defendants.

<sup>8</sup>D.E. 1300 at 4-5 n.3 (“[Plaintiff presents] no specific facts as to how or when she learned this information, nor that she would know there was anything illegitimate about the financing of Azurix, no less how she would know \* \* \*.”), 8 (“[Plaintiffs do] not plead that Mark-Jusbache had any role in Enron’s purchase of Azurix or that she was aware of these alleged facts, no less how or when she learned of them.”), 11 (“Lead Plaintiff has failed to plead with specificity what material information she knew or when and how she obtained it.”).

**B. At Most Plaintiff Alleges Inadequate Claims of Motive and Opportunity.**

All but a very few of the allegations Plaintiff asserts against the Officer Defendants fall within five categories:<sup>9</sup> (1) Defendants held management positions with Enron or its subsidiaries; (2) Defendants received bonuses; (3) some Defendants were present during conference calls with analysts or attended presentations to analysts; (4) Defendants sold Enron stock; and (5) Defendants were members of the Enron “Management Committee” for a period of time.

Because the Court focused on the last category – membership on the Management Committee – in ruling on the initial Motions to Dismiss, it is discussed in detail below. Before doing so, however, it bears repeating that none of the other categories of allegations – even when taken together – raises a strong inference of scienter, because, in the absence of particularized details, none of them connects any Officer Defendant with any allegedly fraudulent transaction, misleading statement, or knowledge of specific material, undisclosed information.

1. *Management positions* – Numerous decisions, including several from this Court, hold that alleging managerial positions or membership on a Board does not raise a strong inference of scienter. *See, e.g.*, cases cited in Joint Brief, D.E. 735 at 8-9.

2. *Receipt of bonuses* – Each of these Officer Defendants is alleged to have received significant bonuses from Enron, but it is quite clear that the “alleged desire to increase compensation does not support a strong inference of scienter,” *In re Azurix Corp. Sec. Litig.*, 198 F. Supp. 2d 862, 890 (S.D. Tex. 2002) (citing Fifth Circuit decisions), *aff’d*, *Rosenzweig v. Azurix Corp.*, No. 02-20804 (5<sup>th</sup> Cir. June 13, 2003). This Court has recognized and applied this point in connection with its Order on Mark-Jusbasche’s Motion to Dismiss. “Without particular factual

---

<sup>9</sup>Exceptions are discussed in part II below in connection with individual officer defendants.

allegations that show that Mark-Jusbasche knew or recklessly disregarded indications that the financial reports were fraudulent,<sup>10</sup> her receipt of large bonuses based on Enron's apparent success is not sufficient to plead scienter." D.E. 1300 at 13.

3. *Alleged participation in conference calls or presentations without any statements being attributed to the individual Defendant* – Plaintiff alleges that Defendants Frevert, Kean, Koenig, Whalley, McMahon, and Causey participated in one or more conference calls or presentations to analysts and investors during which allegedly false or misleading statements were made, but Plaintiff does not attribute any of those statements to any of these Officer Defendants. See Amended Complaint, ¶¶ 119, 145, 157, 179, 197, 224, 247, 263, 282, 309, 317, 329, 343, 366, 377, and 388. This "group speaking" variation on group pleading does not suffice to allege any element of securities fraud against any of the these Officer Defendants. *See* cases cited in Certain Officers Reply Brief, D.E. 921 at 12-13. This Court appears to have recognized this point in its Memorandum and Order of Partial Dismissal of Claims against Individual Andersen Defendants (D.E. 1241, at 12 n.8) ("Here Lead Plaintiff has not identified the specific speakers or statements and appears to be trying to make an end-run around the pleading requirements imposed by Rule 9(b) and the PSLRA for a § 10(b) claim against the individual Andersen Defendants.").

4. *Sale of Enron stock* – The Officer Defendants' original Motions to Dismiss contain detailed arguments, with supporting legal authority, that the allegations concerning their respective sales of Enron stock during the Class Period do *not* constitute legally sufficient evidence of scienter, much less constitute a primary violation of Section 10(b). See also D.E. 921 at 19-23.

---

<sup>10</sup>Similarly, there are no particular factual allegations that show that any of the Officer Defendants knew or recklessly disregarded indications that the financial reports were fraudulent.

This Court evidently agrees that the allegations are insufficient to raise a strong inference of scienter:

In most of the cases of the Insider Defendants whose motions are under review here,<sup>11</sup> their trading of their Enron securities during the Class Period may not satisfy the requirements for pleading scienter, i.e., that such trading must be dramatically out of line with their prior trading history and suspicious and unusual in timing and amount.

D.E. 1299 at 10-11. But the Court went on to state that “their trading clearly states a claim for a primary violation of § 10(b),” based on “the repetitive fraudulent devices and transactions that they countenanced on the Management Committee, before they traded their Enron securities.” *Id.* at 11. But, as discussed in detail next, *there are no particularized allegations that any Officer Defendant attended any Management Committee meeting* at which any particular “fraudulent device [or] transaction” was discussed or countenanced. And it follows, then, that there can be no allegations that any of the Officer Defendants traded Enron securities *after* a Management Committee meeting at which, in their presence, any fraudulent device or transaction was discussed or countenanced.

5. *Membership on Management Committee* – Inasmuch as the Motions to Dismiss evidently turn on this particular allegation, we discuss it separately and in detail.

**C. The Officer Defendants Pointed Out That The Court Had Improperly Expanded the Plaintiff’s Allegation About The Management Committee.**

Based on the paucity of allegations attributing misrepresentations to the Officer Defendants, or even mentioning them at all, the Officer Defendants moved individually to dismiss the Consolidated Complaint. The Court denied the motions, relying heavily on the Officer Defendants’

---

<sup>11</sup>The one exception apparently was Cindy K. Olson. While D.E. 1299 did not address the claims against Richard B. Buy, Jeffrey McMahon, or Richard A. Causey, there is nothing significantly different about their trading of Enron stock that renders it suspicious and unusual in timing and amount.

i (

membership on the Enron Management Committee and the Court's beliefs that such Management Committee was "all-powerful" and that its members "again and again" cast "votes authorizing virtually identical deceptive devices and contrivances at critical reporting times." (D.E. 1299 at 10). The Court also noted that the Officer Defendants were alleged to have been involved in the "day-to-day" business of Enron (e.g., D.E. 1299 at 6).

This Court has in other cases repeatedly rejected the notion that scienter could be inferred from allegations of "day-to-day" involvement. *In re Securities Litigation BMC Software, Inc.*, 183 F. Supp. 2d 860, 885 (S.D. Tex. 2001) (Scienter under §10(b) cannot be adequately pleaded merely through general allegations about defendants' executive positions, their involvement in **day-to-day** management of [the business], their access to internal corporate documents, conversations with corporate officers and employees, and their attendance at management and Board meetings."). (See, D.E. 1241 at 13-14).

The Court's reliance upon the notion that the Management Committee voted on the transactions about which Plaintiff complains and that its members must have been aware of some fraud in connection with those transactions, permeates the Court's rulings:

"To obtain **formal permission for corporate acts**, again and again this key Committee was presented with **successive requests to authorize** virtually the same modes enabling fraud and self-aggrandizement throughout the vast business empire at Enron, yet the Committee continued to issue **rubber-stamp approvals**, while its members pocketed increasing compensation, and many received enormous bonuses."

(D.E. 1299 at 5-6 (emphasis supplied)).

"**Significantly**, the Insider Defendants were not only intimately involved in the company's daily business, but they also **sat on the Management Committee**, controlling the corporation during critical years."

(*Id.* at 8 (emphasis supplied)).

“As members of **these committees**, they **had to approve not only the formation and financing, but the transactions of the SPEs and partnerships**, which ‘miraculously’ drew off debt and provided sham earnings at critical reporting times, **again and again.**”

(*Id.* at 9 (emphasis supplied)).

“Insider Defendants’ **successive resolutions at committee and board meetings**, again and again **authorizing virtually identical deceptive devices** and contrivances at critical reporting times, were essential to effectuating them and Enron’s course of business. As pleaded in Plaintiff’s complaint, Insider Defendants **successive votes of approval**, which sooner rather than later had to be made with full knowledge or severely reckless disregard of the fraudulent scheme they were erecting, comprised material deceptive acts or contrivances in furtherance of Enron’s course of business and the alleged Ponzi scheme, intended to deceive investors, and thus constituted primary violations of §10(b).”

(*Id.* at 10 (emphasis supplied)).

“Insider Defendants’ position on the **all-powerful Management Committee** and their **votes while on that Committee** demonstrate that they had the power to control Enron.”

(*Id.* at 13 (emphasis supplied)).

“[A]ny executive sitting for a length of time on the Management Committee, which was repeatedly asked to approve these deceptive devices and contrivances, **would have had to be aware** or have recklessly disregarded the warning signs.”

(D.E. 1347 at 7 (emphasis supplied)).

The Officer Defendants pointed out that Plaintiff had provided no particular allegations about anything the Management Committee was supposed to have done to approve any transaction.

Plaintiff’s only allegations about the Management Committee are:

“The day-to-day business of Enron was conducted by Enron’s top executives and its ‘Management Committee,’ a collection of top officers who met regularly (weekly or bi-weekly) to oversee and review Enron’s business. The Management Committee was aware of and approved all significant business transactions of Enron, including

each of the partnership/SPE deals specified herein. The Enron Defendants' roles on the Enron Management Committee during 97-01 are set forth below:

[Lists of 22 Defendants and corporate titles]"

(Consolidated Complaint at 105, ¶ 88).<sup>12</sup>

"Further not only were these transactions large, frequent, widespread and often at quarter-end, they were also highly structured and complex, requiring the personal attention of several top executives of Enron, especially those sitting on the Enron Management Committee, and the review and approval of board members, especially those sitting on Enron's Board's Executive, Finance and Audit Committees, which had jurisdiction over these types of corporate transactions and activities."

(*Id.* at 309, ¶ 395).<sup>13</sup>

"The Enron Defendants who were on Enron's Management Committee were the top executives of Enron. They had daily contact with each other while running Enron as 'hands-on' managers, dealing with important issues facing Enron's businesses, *i.e.*, WEOS, EES, EBS, its JEDI and LJM partnerships and related SPEs and Enron's future revenue and profits."

(*Id.* at 310, ¶ 397).<sup>14</sup> Of the 1,030 paragraphs in the 497-page Consolidated Complaint only these three references to the Management Committee could serve as the support for the Court's statement

---

<sup>12</sup>Contrary to the allegation, no "roles on the Enron Management Committee are set forth, only corporate titles (e.g., "Vice President, Public Affairs, Enron Corp.") (Consolidated Complaint at 91, ¶ 88).

<sup>13</sup>The Court correctly found that this same allegation was inadequate to state a claim against the Directors. (*See* March 12, 2003 Order at 98, 111 (#1270)).

<sup>14</sup> In dismissing fraud claims against the Outside Directors, this Court correctly rejected allegations that the defendants "had access to the adverse non-public information about the Company's business, finance, products, markets and present and future business prospects via access to internal corporate documents (including the Company's product sales, operating plan, budget and forecast and products sales reports of actual operations compared thereto), conversation and connections with other corporate officers and employees **and attendance at management and Board of Directors meetings and committees** thereof via reports and other information provided to them in connection therewith" because "[s]uch vague generalities do not meet the heightened pleading standards laid out by this Court in prior orders for pleading scienter under §10(b)." (D.E. 1269 at 112 (emphasis supplied)).

that the Committee was “all powerful” and voted to approve each of the transactions at issue in this case.

In their Motion to Reconsider the Officer Defendants explained that the Court had misconstrued and improperly expanded Plaintiff’s Complaint by concluding that the Management Committee voted on the transactions at issue in this case. (D.E. 1318 at 3-5). The Officer Defendants also pointed out that the Court had confused the Management Committee of Enron officers with the Executive Committee of the Board of Directors when it found that the Management Committee had “the power to exercise all of the powers of the Board of Directors.” (D.E. 1299 at 8 quoting Complaint at 89, ¶ 85 (c)). The Court later acknowledged its error, but maintained that the error was immaterial. (D.E. 1345 at 2).

While Plaintiff generally alleged that the Management Committee “approved all significant business transactions of Enron” (D.E. 441 at 91, ¶ 88), Plaintiff nowhere alleged that any votes were taken or how any of the Officer Defendants voted on any matter at issue in this case. (D.E. 1318 at 4-5). The Officer Defendants argued that Plaintiff made no such allegation because, in fact, there were no votes at any Management Committee meeting approving any of “the dubious partnerships and SPE deals.” (D.E. 1318 at 7; D.E. 1338 at 6). Defendants challenged Plaintiff to allege with particularity that the Management Committee voted on even one of the transactions about which Plaintiff complains. (D.E. 1318 at 8-9).

Plaintiff responded that it was “preposterous” for the Officer Defendants to claim that Plaintiff had not voted on the transactions because, “How else could the Management Committee approve the dubious partnerships and SPE deals without its members casting a vote?” (D.E. 1338 at 6). Answering this question with its own questions, Plaintiff evaded the question.

The Officer Defendants recognize that the Court must accept Plaintiff's allegations as true, and the Defendants may only present evidence from sources Plaintiff cites at this stage, but the implications of Plaintiff's ignoring the Court's proposed road map is significant. Suppose that Plaintiff knows that the Management Committee did not vote on transactions and that it only met periodically only to provide senior Enron management with cursory, generalized updates of developments in Enron's many business units. If so, the Court's result rests on an allegation the Plaintiff does not state or support. The Court, then, has written the Complaint it has sustained.

Plaintiff further claimed that "[a]s to each Insider Defendant, Lead Plaintiff has outlined his position, the committees on which he served, **has included minutes from various meetings he attended, and identifie[d] various SPEs approved by him.**" (D.E. 1338 at 9 (emphasis supplied)). Plaintiff likewise claimed that it had "provided detail regarding the various fraudulent transactions along with the **role of each defendant in approving, running, and making statements** regarding such devices and contrivances." (D.E. 1338 at 10 n.6).

In fact, Plaintiff misrepresented its own pleading. Contrary to its counsel's representations, Plaintiff had **not** "included minutes from various meetings" each Officer Defendant attended. In fact, Plaintiff had not included any minutes from any meeting of any Management Committee of officers. Also contrary to its representations, Plaintiff had **not** "identifie[d] various SPEs approved by" each Officer Defendant. In fact, Plaintiff had not identified a single act of any of the Officer Defendants to approve of any SPE.

Particularized pleading regarding the Management Committee was critical because of Plaintiff's obfuscation or confusion in the pleadings and even in the Court's orders on this issue. This Court has already "concede[d] confusion in its reference to the Executive and Management

Committees” in its First Order Re Officer Defendants. (D.E. 1345 at 2). That confusion persists. Plaintiff has never alleged that any committee of Enron managers approved a waiver of any Fastow conflict of interest. To the contrary, Plaintiff has openly acknowledged that no committee of management granted any such waiver. The Board approved the waiver. But in its Order Re Remaining Defendants, the Court repeatedly refers to the Management Committee approving a waiver of Fastow’s conflicts of interest:

“The Committee members **three times approved a waiver of Fastow’s [and Michael Kopper’s] conflicts of interest**, contrary to Enron’s own code of Conduct, and sanctioned the creation of most of the SPEs and partnerships . . .”

(D.E. 1347 at 7).

The “key Management Committee” “conducted the day-to-day business of Enron and **repeatedly waived Fastow’s conflicts of interest**, and approved all significant business transactions, including those with the LJM partnerships and the illicit SPEs at the core of the alleged Ponzi scheme.”

(D.E. 1347 at 38).

The Court also confused the Management Committee for the Executive Committee of the Board when it wrote “the only exhibit in the record of the Management Committee minutes, i.e., for a November 5, 1997 meeting [are] (#856 Ex. 21).” (D.E. 1347 at 18). The minutes the Court cites as “Management Committee minutes” are minutes of the Executive Committee of the Board, not minutes of any Management Committee of officers.

This Court dismissed claims against Defendant Hirko because, “The complaint does not allege that Hirko attended the meetings of the Management Committee in Houston.” Neither the Consolidated Complaint nor the Amended Complaint alleges that any one of the Officer Defendants attended any Management Committee meeting, ever, let alone what was discussed at the meeting

or how any Officer Defendant voted on any of the purportedly improper transactions. The Court also points out that Defendant Hirko “remained in Oregon and never lived in Houston, where management of the day-to-day operations took place.” (Memorandum And Order Re Remaining Insider Defendants at 17). Physical location cannot be the determining factor, however, because the Court denied Mr. Frevert’s motion to dismiss even though he was, according to the Complaint itself, “Chairman and Chief Executive Officer of Enron *Europe*,” based in London for most of the Class Period. (First Amended Complaint at 71, ¶83(f) (emphasis supplied)).

The Court’s treatment of the officer Defendants contrasts starkly with its analysis of the Board’s role in the company. Plaintiff “submitted copies of minutes of related, key Enron board of directors or committee meetings to demonstrate the Outside Directors’ knowing and reckless participation in the alleged Ponzi scheme.” (D.E. 1269 at 90-91). Those Board minutes included dates, times convened and adjourned, attendees, subjects discussed, motions made, and resolutions passed. The Court correctly found Plaintiff’s allegations lacking in particularity because the minutes provided “merely brief allusions or lists of topics touched on, presented and/or discussed during the meetings, but no particular facts or details about the presentation or discussion . . . that would indicate that the Outside Directors knew or recklessly disregarded that there was a Ponzi scheme afoot . . . .” (D.E. 1270 at 98). In contrast to the Board minutes that Plaintiff submitted (and this Court rejected), Plaintiff has provided no minutes of any Management Committee meetings and Plaintiff has offered no hint at what was discussed at any such meeting. Plaintiff provided no dates, no times convened or adjourned, no suggestion of who attended any particular meeting, no mention of what was discussed or what motions were made, no clue as to how any individual voted, or no glimmer of what resolutions were considered or passed. From the

allegations in the First Amended Complaint one cannot tell whether any one of the Officer Defendants is accused of even attending any particular meeting.

The First Amended Complaint still contains no allegations of “formal permission” being granted “again and again” by the Management Committee, no allegations of “successive requests to authorize” fraudulent transactions, no reference to “rubber-stamp approvals,” no allegations of “intimate[] involve[ment],” by the Officer Defendants, no allegations of any resolutions, let alone “successive resolutions at committee and board meeting, again and again authorizing virtually identical deceptive devices and contrivances,” no allegation that “[a]s members of these committees, they had to approve not only the formation and financing, but the transactions of the SPEs and partnerships, which ‘miraculously’ drew off debt and provided sham earnings at critical reporting times, again and again,” no allegations of an “all-powerful Management Committee,” and, perhaps most telling of all, not a single allegation regarding any of the Officer Defendants’ “votes while on that Committee.” (D.E. 1299 at 5-6, 8, 9, 10, 13). Astonishingly, the only place one finds those suggested allegations is in this Court’s Order denying the Officer Defendants’ motions to dismiss. (D.E. 1299 at 5-6, 8, 9, 10, 13).

## **II. Plaintiff Also Failed To Make The Other Individual Allegations On Which The Court Relied.**

### **A. Plaintiff Has Declined The Court’s Invitation To Plead Fraud Based On Party Skits.**

In its initial order regarding the Officer Defendants, “the Court points to the well-publicized PowerPoint presentation for the 2000 Christmas Party at Enron. The program joked about Enron’s video-on-demand venture with Blockbuster and Project Braveheart while satirizing the alleged fraudulent accounting employed to effectuate the alleged scam. That PowerPoint presentation has

since been incorporated into the indictment of former Enron Broadband Services employees, Kevin Howard and Michael Krautz, where it is no longer a laughing matter.” (D.E. 1299 at 7 n.6). In fact, while the PowerPoint presentation and the Christmas Party were mentioned in an attachment to the United States’ Complaint against Messrs. Howard and Krautz, it was omitted from the indictment that followed. It was also omitted from the superseding indictment against Messrs. Howard and Krautz and others that followed that. But, most importantly, it was omitted from the Plaintiff’s First Amended Complaint that followed this Court’s First Order Re Officer Defendants and those indictments.<sup>15</sup>

The Court also concluded, “that the Insiders knew and treated with jocularity the alleged shenanigans at Enron from early on is apparent in the also publicized 1997 video from the farewell party for former Enron President Richard Kinder, in which Jeffrey Skilling jests, ‘We’re going to move from mark-to-market accounting to something I call HFV, or hypothetical future accounting. If we do that, we can add a kazillion dollars to the bottom line.’” (D.E. 1299 at 7 n.6). But as with the Christmas skit allegations, despite this Court’s reliance upon the Kinder video, Plaintiff chose not to include any allegation about the video in its First Amended Complaint.

**B. Richard Buy.**

Refusing to grant Mr. Buy’s first motion to dismiss, despite inadequate pleadings against him, the Court held that Lead Plaintiff *could* state a claim against Mr. Buy “*provided that* Lead Plaintiff does amend/supplement . . .” (D.E. 1347 at 14-16 (emphasis supplied). Lead Plaintiff

---

<sup>15</sup>In another section of its order, devoted to Mr. Rice, the Court quoted an SEC complaint. (D.E. 1347 at 21 n.7). Plaintiff did not add the quoted portion mentioned by the Court or attempt to incorporate any portion of that SEC Complaint, either.

declined the Court's invitation. The allegations against Mr. Buy in the Amended Consolidated Complaint are the same as those in the first Complaint, except for Lead Plaintiff's still inadequate pleadings under the Texas Securities Act.

**1. Lead Plaintiff Only Asserts Motive And Opportunity Allegations Against Mr. Buy.**

Lead Plaintiff includes Mr. Buy in its First, Second and Sixth Claims for relief. These claims allege violations of §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 (First Claim), violations of § 20A of the 1934 Act (Second Claim), and violation of the Texas Securities Act, Art. 581-33F(1) (Sixth Claim). The only factual allegations against Richard Buy in the First Amended Complaint, however, relate to his position, compensation and stock trades. These allegations of motive and opportunity are insufficient to state a claim under the PSLRA. *See Rosenzweig*, slip. op. at 19. “[T]o hold otherwise, ‘would effectively eliminate the state of mind requirement as to all corporate officers and defendants.’” *Id.* (Citations omitted).

**2. Lead Plaintiff Did Not Add The Allegations The Court Suggested Against Mr. Buy.**

Recognizing the pleading deficiencies against Mr. Buy in the Consolidated Complaint, the Court granted Lead Plaintiff leave to amend its complaint to add new allegations that the Court found from two sources extraneous to the Complaint. (D.E. 1347 at 16). The two extraneous sources relied on by the Court were the Powers Report, which the Court recognized had not been made part of the record, and minutes of meetings of various Board of Directors committees that were submitted in opposition to the motions to dismiss. (D.E. 1347 at 14). The Court relied on the Powers Report even though Plaintiff had not included those allegations about Mr. Buy in its Consolidated Complaint. The Powers Report was issued months before the Plaintiff's Consolidated

Complaint and Plaintiff had referenced the Powers Report in allegations against other defendants. (See, e.g., Consolidated Complaint at ¶¶ 800, 825, and 830). The Court further drew conclusions from the board minutes that had not been alleged by Lead Plaintiff that “all transactions involving Fastow, Enron and the LJM partnerships would have to be reviewed and approved by Chief Accounting Officer Causey and Chief Risk Officer Buy.” (D.E. 1347 at 14).<sup>16</sup>

Despite the Court’s instruction, Lead Plaintiff did not amend to add *any* allegations against Mr. Buy. Lead Plaintiff’s First Amended Complaint contains the same allegations against Mr. Buy as its Consolidated Complaint. Lead Plaintiff did not add the allegations from the Board of Directors meeting minutes. Although Lead Plaintiff filed the Powers Report, it did not incorporate any statements in that 203 page report into the First Amended Complaint as allegations against Mr. Buy. Just as Lead Plaintiff’s opposition to the motions to dismiss cannot supplement its Complaint, so neither can a document it has filed but not incorporated into its Complaint.

Plaintiff’s Consolidated Complaint should have been judged based upon the allegations within its four corners and dismissed. Instead, this Court gave Plaintiff an opportunity to add allegations that the Court found outside the Complaint. Because Plaintiff has declined that invitation, Plaintiff’s First Amended Complaint must be dismissed.

**3. Lead Plaintiff’s Texas Securities Act Claims Against Mr. Buy Contain Allegations That Are Inconsistent With Its Other Complaint Allegations.**

The Registration Statements and Prospectus (the “Selling Documents”) that Lead Plaintiff complains about under the Texas Securities Act were issued in July 1998. Lead Plaintiff alleges

---

<sup>16</sup>As noted above, the Court relied upon those Board of Directors minutes to find a claim against Mr. Buy, even though the Court found that they were insufficient to state a claim against the Directors themselves.

that the “materially false” information contained in the Selling Documents was the incorporation of Enron’s 1997 financial statements by reference. (Amended Consolidated Complaint, ¶ 1016.13). Lead Plaintiff then alleges that Mr. Buy, and others, are liable under Texas Securities Act, Art. 581-33F(1) “[b]y virtue of their positions as directors and/or senior officers of Enron, including their positions on Enron’s Management Committee, each defendant listed in this paragraph directly or indirectly exercised control over Enron.” (*Id.* at ¶ 1016.27). However, Lead Plaintiff’s allegations of Mr. Buy’s control over Enron are inconsistent with other parts of its First Amended Complaint.

In paragraph 83(I), Lead Plaintiff alleges only that Mr. Buy became a “senior officer” of Enron in early 1999, roughly 10 months after the disputed note issuance. Mr. Buy is alleged to have been the Management Director and Chief Risk Officer of ECT, an Enron subsidiary, beginning in January 1998, but that hardly makes him a controlling person of Enron, ECT’s parent corporation. Moreover, Mr. Buy was not and is not alleged to have held any officer position within Enron during 1997, when activities forming the basis of Enron’s allegedly false 1997 financials occurred. Lead Plaintiff simply has not met its burden to allege Mr. Buy to be a controlling person of Enron during 1998 when the disputed notes were issued and sold. On that basis, the Court should dismiss the Texas Securities Act claims against Mr. Buy.

### **C. Richard Causey**

Lead Plaintiff attempts to state causes of action against Mr. Causey under §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 (First Claim), violations of § 20A of the 1934 Act (Second Claim), §§ 11 and 15 of the 1933 Act (Fourth Claim), and violation of the Texas Securities Act, Art. 581-33F(1) (Sixth Claim). Mr. Causey contends that the § 10(b) and Rule 10b-5 claims (First Claim) claims should be dismissed because Lead Plaintiff still has not pled allegations that survive the

rigorous requirements of the PSLRA. Mr. Causey further contends that the § 20A claims (Second Claim) should be dismissed because they are derivative of the § 10(b) and Rule 10b-5 claims.

**1. Plaintiff Has Not Added The Allegations This Court Suggested Against Richard Causey.**

Like Mr. Buy, the Court found that Lead Plaintiff's allegations against Mr. Causey did not state a claim under § 10(b) and Rule 10b-5. The Court denied Mr. Causey's motion to dismiss, however, on the expectation that Lead Plaintiff would amend or supplement its allegations against Mr. Causey to include the same allegations from extraneous sources that the Court relied upon. (D.E. 1347 at 16, 24-29). Those allegations are absent from the Consolidated Complaint and the First Amended Complaint against Mr. Causey just as they are absent from those complaints against Mr. Buy.

In addition, the Court relied on "allegations" from two additional sources to deny Mr. Causey's motion to dismiss that were not included in or referenced in the Complaint. Yet, despite the Court's reliance upon these unpled allegations, Plaintiff did not include them in its First Amended Complaint.

First, the Court took "judicial notice" of "facts" reported in the popular press. "The Court takes judicial notice of the fact, reported in numerous newspaper and magazine articles, that Causey is an accountant, that he joined Arthur Andersen in the 1980's and worked in Houston auditing the Enron account, and that Causey was hired by Jeffrey Skilling, then head of the company's trading and finance unit, to work for Enron in 1991. *See, e.g.,* David Barboza, 'U.S. Hints Ex.-Enron Accounting Chief Had Role In Fraud' [*The New York Times*, October 4, 2002]" (D.E. 1347 at 25). The Court further writes, "Although some of the article's allegations are not appropriate for judicial

notice, the Court observes that according to Barboza, Causey ‘was said to have specialized in off-balance-sheet deals, which are at the heart of the Enron scandal.’ *Id.* Barboza reports that at Enron Causey worked for some of the first off-balance-sheet partnerships, including JEDI. *Id.*” (D.E. 1347 at 25-26 n.8).

The Court’s selective “judicial notice” and its “observ[ations]” suffer from a number of defects.<sup>17</sup> Among the “facts” in the article that the Court apparently neither “judicially notice[d],” nor noted that it had “observe[d],” were that Causey was “a respected accountant,” “pleasant and kind,” “not charged with any crime,” “well liked within the company,” “the consummate professional, a stickler for accounting detail,” “friendly and unpretentious,” “a nice guy, but he did not like to fight; he was not a bully,” who “never really fit into his company’s aggressive corporate culture,” and who was “not particularly close to Mr. Fastow.” (David Barboza, *U.S. Hints Ex-Enron Accounting Chief Had Role In Fraud*, *The New York Times*, October 4, 2002). Even more fundamentally, none of these facts or the facts relied upon by the Court is alleged in the Plaintiff’s Consolidated Complaint or in their First Amended Complaint. The presence of these facts or allegations, or any others, in a newspaper is irrelevant. They cannot provide the particularized

---

<sup>17</sup>The Court’s *sua sponte* “judicial notice” of “facts” in a newspaper article stands in stark contrast to the Court’s refusal to grant judicial notice to a report from the United States Senate. (Order Entered March 20, 2003 at 4). In refusing to grant judicial notice there, the Court wrote, “Nevertheless, the Court concurs with Defendants that Federal Rule of Evidence 201(b) allows the Court to take judicial notice only of a fact ‘not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” (Order Entered March 20, 2003 at 4). The Officer Defendants respectfully submit that the “facts” at issue here are neither “generally known” nor are they from a “source whose accuracy cannot reasonably be questioned.” *See, e.g., Correcting The Record: Witnesses And Documents Unveil Deceptions In A Reporter’s Work*, *The New York Times*, May 11, 2003 (“Following is an accounting of the articles in which falsification, plagiarism and similar problems were discovered in a review of articles written by Jayson Blair.”).

allegations required to satisfy the PSLRA because they are not in the Complaint.

Second, the Court relied upon (and quoted at length) an indictment of Andrew Fastow. From that indictment, the Court discerned that Mr. Causey had “an undisclosed agreement with Fastow that ensured that, over time, LJM would not lose money in its dealings with Enron” and that “Fastow, Enron’s CAO [apparently Causey] and others devised a scheme to manufacture a \$41 million payment from Enron to LJM.” (D.E. 1347 at 26-27 n. 9). Plaintiff did not include either of those allegations in its First Amended Complaint.

Plaintiff may have declined the Court’s invitation to include the allegations upon which the Court relied because the Barboza article on which the Court relied noted, “Some former Enron executives, however, question the accuracy of the information since they recall that Mr. Fastow and Mr. Causey worked with one another but did not appear to be personally close.” (David Barboza, “U.S. Hints Ex.-Enron Accounting Chief Had Role In Fraud” *The New York Times*, October 4, 2002), but it is more likely that Plaintiff declined that invitation because the Federal Grand Jury that issued the indictment did not repeat the allegations against Mr. Causey. In a superseding indictment of Mr. Fastow, the Grand Jury dropped the allegation that any “CAO” had “an undisclosed agreement with Fastow” and instead of alleging that “FASTOW, Enron’s CAO and others devised a scheme to manufacture a \$41 million payment,” the Grand Jury charged that “FASTOW, GLISAN and others devised a scheme.” (Superseding Indictment of Fastow et al., April 30, 2003).

**2. Lead Plaintiff’s Only “New” Allegation Of Fact Against Mr. Causey Does Not Raise An Inference Of Fraud.**

The only allegation that Lead Plaintiff arguably adds against Mr. Causey is a statement in paragraph 742.19 that “Merrill Lynch obtained a letter signed by Enron’s CAO, Causey, stating that

Enron did not rely on Merrill Lynch for accounting advice.” (Consolidated Complaint, ¶ 742.19). But this “allegation” does not suggest fraud by Mr. Causey. Enron relied on Andersen, and Andersen had approved the challenged transaction. Since the Amended Complaint does not include the allegations relied on by the Court to deny Mr. Causey’s motion to dismiss, the Court should now limit its consideration to the allegations in the Amended Complaint and dismiss the § 10(b), Rule 10b-5 and § 20A claims asserted against Mr. Causey.

**D. Jeffrey McMahon**

After determining that the Complaint allegations against Mr. McMahon were inadequate to state a claim, the Court nevertheless refused to dismiss claims against him based on extraneous information not contained in Lead Plaintiff’s pleading. Implicit in the Court’s discussion of Mr. McMahon was an obligation for Lead Plaintiff to replead to add allegations that the Court relied upon. Because Lead Plaintiff turned down the Court’s invitation to add suggested claims about Mr. McMahon into the Amended Consolidated Complaint, the claims against Mr. McMahon still fail to allege a cause of action against him and should be dismissed.

**1. Lead Plaintiff only asserts motive and opportunity allegations against Mr. McMahon.**

Lead Plaintiff alleges that Mr. McMahon violated §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 (First Claim) and violations of § 20A of the 1934 Act (Second Claim). Yet the only pertinent factual allegations against Mr. McMahon in the First Amended Complaint relate to his position, compensation and stock trades. This Court already found that the only representations attributed to Mr. McMahon in the complaint “do not appear to be telling in content or in timing.” (D.E. 1347 at 30 n.6).

**2. Plaintiff Has Not Added The Allegations This Court Relied Upon In Denying Jeffrey McMahon's Motion To Dismiss.**

Having rejected the allegations relied upon by Lead Plaintiff in opposing Mr. McMahon's motion to dismiss, the Court again refused to dismiss Mr. McMahon, relying again on two allegations that Plaintiff had not alleged.<sup>18</sup> The first related to a meeting between Mr. McMahon and Mr. Skilling that was referenced in the Powers Report. However, as with Messrs. Buy and Causey, Plaintiff has made no effort to incorporate any of the statements in the Powers Report as allegations against Mr. McMahon and, therefore, they cannot serve to support Lead Plaintiff's First Amended Complaint.<sup>19</sup>

Second, the Court "takes judicial notice of the widely publicized fact that McMahon started his career working for Arthur Andersen in Houston after he finished college." (D.E. 1347 at 32). The Court's *sua sponte* judicial notice of facts not pled is inappropriate and such facts cannot serve to support a complaint that does not include them. But even if properly noticed or properly alleged, the fact that Mr. McMahon worked at Arthur Andersen decades before the events at issue in this case does not even imply that he had knowledge of fraud. Indeed, this Court has already dismissed claims against individuals who were employed at Arthur Andersen at the same time as Mr.

---

<sup>18</sup>The Court also relies upon an allegation that "Jeff McMahon or Ben Glisan" would meet with a banker from CS First Boston (D.E. 1347 at 32), but neither the Complaint nor the First Amended Complaint recounts when any meeting was held, what was said in the meeting, or who said it, or even whether it was actually Jeff McMahon who attended the meeting "or Ben Glisan."

<sup>19</sup>The statements in the Powers Report do not support a fraud claim against Mr. McMahon. The Powers Report describes a meeting between Mr. McMahon and CEO Jeffrey Skilling in which Mr. McMahon made Mr. Skilling aware of internal conflicts created by Mr. Fastow's involvement in LJM. (Powers Report at 166-67). Nowhere in the Consolidated Complaint, the First Amended Complaint, or the Powers Report is it alleged that Mr. McMahon discussed SPEs with Mr. Skilling. Moreover, to the extent Mr. McMahon was complaining of Mr. Fastow's situation with Mr. Skilling, he was acting as Plaintiff claims others should have acted.

McMahon was supposed to have been and who continued to work there and allegedly even worked on the very transactions at issue in this case. (D.E. 1241).

Because the Court rejected Lead Plaintiff's allegations and Lead Plaintiff rejected the Court's invitation to include the allegations on which the Court relied, the claims against Mr. McMahon must be dismissed.

**E. Cindy Olson**

Lead Plaintiff did follow the Court's suggestion to amend its pleading against Ms. Olson. However, Lead Plaintiff's amended pleading still falls short of stating a claim against Ms. Olson pursuant to the PSLRA pleading requirements.

Cindy Olson was not involved in carrying out the "business" of Enron during the Class Period; she managed Enron's human resources department. (*See generally* D.E. 641). Plaintiff offers no allegations about what Management Committee meetings, if any, she attended, or what she heard at those meetings.<sup>20</sup> Ms. Olson is not alleged to have made any misrepresentations. She was not, nor was she alleged to have been, involved in the creation and publication of Enron's financial statements. She had no involvement in the creation, management or transfer of assets to any SPE or partnership. She also is not alleged to have had any involvement with Arthur Andersen or any aspect of Enron's accounting. This Court dismissed the Arthur Andersen Individuals because of the lack of specificity about each partner's involvement in Arthur Andersen's "group" accounting effort. This Court also dismissed claims against the members of Enron's Audit Committee that received regular presentations from Arthur Andersen. Inexplicably and without any

---

<sup>20</sup> The Court also relies upon allegations regarding Ms. Olson's stock sales. But the Complaint recognizes that her term on the Management Committee ended in 1999, almost a year before the stock sales discussed in the Court's Order.

specific allegations related to Olson's culpability, the Court concludes that because Ms. Olson had been an accountant years before she took over the human resources responsibilities and, therefore, was "no layman to accounting manipulations," Olson "had to be aware of" something. (D.E. 1299 at 7, 12).

The new allegations against Ms. Olson relate primarily to a statement Ms. Olson made to Enron employees who are not putative class members here, since they have brought claims in the *Tittle* case. They also include allegations that Ms. Olson had the sophistication to understand the transactions at issue in this case because she had once been a (non-financial) accountant and that when Sherron Watkins came to her, she should have done more than just set up a meeting for Ms. Watkins with the President and Chief Executive Officer of Enron. (First Amended Complaint at 87-89 ¶¶ 83q.2-q.5). Of course, this Court has already dismissed the fraud claims against more sophisticated people on Enron's Finance and Audit Committees and more knowledgeable accountants at Arthur Andersen who were alleged to have actually worked on the transactions at issue. In addition, as this Court has already recognized, the President and Chief Executive Officer to whom Ms. Olson sent Ms. Watkins hired Vinson & Elkins to investigate Ms. Watkins's concerns and "one of the reasons why a large corporation chooses a law firm with an outstanding reputation is confidence in the quality and integrity of its work." (D.E. 1269 at 109; see also D.E. 234 from *Tittle* incorporated herein by reference). Accordingly, one is left with the argument that Ms. Olson must have had scienter because she was on the Management Committee. That argument fails for the reasons set forth in this motion.

**F. Lawrence Greg Whalley**

Without alleging the number or amount of any Enron stock sales by Mr. Whalley, Lead

Plaintiff includes Mr. Whalley in its First and Second Claims for relief asserting violations of §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 (First Claim) and violations of § 20A of the 1934 Act (Second Claim). The allegations against Mr. Whalley fall far short of the PSLRA requirements to state a claim for securities fraud and amount to an allegation of insider trading without a cognizable allegation of any trading.

Lead Plaintiff's allegations against Mr. Whalley consist primarily of allegations of position. The relevant substance of Lead Plaintiff's allegations against Mr. Whalley are contained in paragraph 83(u) of the First Amended Complaint. There, Lead Plaintiff alleges:

Defendant Lawrence Greg Whalley ("Whalley") was President and Chief Operating Officer of Enron since 8/01. Prior to that, Whalley was President and Chief Operating Officer of Enron Capital Wholesale Services. Whalley, in 11/01, told analysts and rating agencies that there were no additional partnerships that had undisclosed debt. Whalley was not considered an officer of Enron (at his request), so that his stock sales would not have to be reported. During the Class Period, while in possession of adverse undisclosed information about the Company, Whalley sold shares of his Enron stock for millions in illegal insider trading proceeds.

First Amended Complaint, ¶ 83(u). Mr. Whalley is not specifically alleged to have been involved in the creation or management of any SPE or partnership, Enron's accounting, or the preparation of Enron's financial statements. (*See generally* D.E. 643). He is alleged to have been on two analyst calls in October and November, 2001 toward the end of the Class Period and shortly after Mr. Whalley became President and Chief Operating Officer of Enron. Mr. Whalley is not alleged to have made any statements on those calls, and none of the statements made on those calls is alleged to have been false. The First Amended Complaint relies solely upon his position on the Management Committee, but recognizes that Mr. Whalley was not on the Management Committee for the first two years of the Class Period.

The only new factual allegation against Mr. Whalley in the First Amended Complaint is contained in paragraph 742.18 relating to allegations against the bank defendants. Lead Plaintiff contends that in late December 1999, Mr. Whalley, “Enron’s chief trader, several times took the very unusual step of leaving Enron’s trading floor during trading hour to persistently query Andersen auditors whether Andersen would approve the swaps [with Merrill Lynch] as adding \$60 million to Enron’s net income.” Even if this allegation were true, it would not imply fraud by Mr. Whalley. Such an allegation does not meet PSLRA standards.

**G. Mark Frevert**

Mr. Frevert is also included in Lead Plaintiff’s First and Second Claims for relief asserting violations of §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 and violations of § 20A of the 1934 Act. Lead Plaintiff does not allege any new facts related to Mr. Frevert in the First Amended Complaint.

Mark Frevert was Chairman and CEO of Enron Europe and lived and worked out of the United States until June 2000. (*See generally* D.E. 646). As with the others, Mr. Frevert is not alleged to have had anything to do with any fraud or any SPEs or partnerships. Mr. Frevert is alleged only to have been on two analyst calls in 2000, but he is not alleged to have made even one statement during those calls. The Complaint relies solely upon Mr. Frevert’s membership on the Management Committee but does not allege which, if any, meetings he attended. This is particularly troubling since Mr. Frevert was out of the country for much of the Class Period.

Mr. Frevert’s stock sales prove beyond any doubt that he lacked scienter of any fraud. Mr. Frevert’s last stock sale occurred nearly a year before the close of the Class Period. Mr. Frevert is alleged to have sold only 44 percent of his total shares held during the Class Period. He held the

majority of his stock until it became worthless when Enron filed for bankruptcy.<sup>21</sup> Mr. Frevert's investment shows that there could not have been any disclosure to him (or the other Officer Defendants) at the Management Committee meetings that Enron was a "Ponzi scheme." As this Court has noted, "Retention of the vast majority of their stock negates any inference of scienter." *In re Waste Management, Inc. Sec. Litig.*, No. H-99-2183 at 131 (S.D. Tex. Aug. 16, 2001) (citing *In re Vantive Corp. Sec. Litig.*, 110 F. Supp. 2d 1209, 1219 (N.D. Cal. 2000) (no scienter because sales of 38 percent of stock "necessarily means they retained 62 percent . . .").

#### **H. Steve Kean**

Mr. Kean is also included in Lead Plaintiff's First and Second Claims for relief asserting violations of §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 and violations of § 20A of the 1934 Act. Lead Plaintiff does not allege any new facts related to Mr. Kean in the Amended Consolidated Complaint.

Steve Kean is alleged to have been "Executive Vice President and Chief of Staff of Enron" (First Amended Complaint at 68, ¶ 83(m)), an administrative position. He is not alleged to have run any business unit, let alone one involved in the alleged fraud. (*See generally* D.E. 657). Mr. Kean is nowhere alleged to have made even one misrepresentation. Although he is alleged to have been present at a few analyst calls or conferences, no statements were attributed to him, nor are there any allegations about information that he specifically knew that would have caused him to doubt any statement he heard others make in those calls.

Plaintiff relies solely upon the allegation that Mr. Kean attended Management Committee

---

<sup>21</sup>At one time, Mr. Frevert had more than \$60 million invested in Enron, all of which became virtually worthless with Enron's bankruptcy.

meetings, but again Plaintiff fails to even allege which, if any, of the Management Committee meetings Mr. Kean attended or how he could have learned what was going on in other parts of Enron. As the Court is well aware, Enron was a world-wide conglomerate and no one person could be expected to have knowledge of all of the activities of “the vast business empire of Enron.” (D.E. 1299 at 5). Plaintiff offers no allegations that would support an inference that Mr. Kean knew about the intricacies or the alleged improprieties of Enron’s accounting and finance.

The only allegations that actually mention Mr. Kean by name relate to his trading of Enron securities. Allegations that this Court already noted, “may not satisfy the requirements for pleading scienter.” (D.E. 1299 at 10).

#### **I. Mark Koenig**

Mr. Koenig is also included in Lead Plaintiff’s First and Second Claims for relief asserting violations of §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 and violations of § 20A of the 1934 Act. Lead Plaintiff does not allege any new facts related to Mr. Koenig in the First Amended Complaint.

Mark Koenig was head of investor relations and did not run a business unit. (*See generally* D.E. 656). As with the other Officer Defendants, there are no allegations in the Complaint that Mr. Koenig made any misrepresentation or that he or his department were involved with any of the questioned SPEs or partnerships. Like Mr. Kean, Mr. Koenig is alleged to have been present at a few analyst calls or conferences, but like Mr. Kean, no specific statements are attributed to him.

Plaintiff relies solely on Mr. Koenig’s alleged membership in the Management Committee, but, as with the others, Plaintiff does not point to a single Management Committee meeting Mr. Koenig is alleged to have attended, let alone identify anything that was disclosed at the unidentified

meeting. Without some specific allegation of how he supposedly learned of it, there can be no reasonable presumption that Mr. Koenig knew of transactions outside of his area of responsibility.

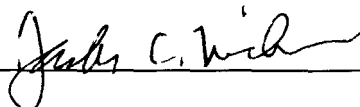
As with the other Officer Defendants, most of the few allegations that actually mention Mr. Koenig by name relate to his trading of Enron securities. Allegations that this Court already noted, “may not satisfy the requirements for pleading scienter.” (D.E. 1299 at 10).

### **Conclusion**

Plaintiff’s Consolidated Complaint did not meet the standards of the PSLRA. This Court suggested allegations Plaintiff could make, but had not, and looked to sources outside the Complaint to find possible claims. The Court set out those allegations in its orders denying the motions to dismiss and gave Plaintiff leave to amend. Plaintiff did not cure the deficiencies in its claims against the Officer Defendants. Accordingly, for the reasons set forth above and also in the Officer Defendants’ motions to dismiss the Consolidated Complaint and Motion to Reconsider the

denial of their Motions to Dismiss, the Officer Defendants respectfully request that this Court dismiss them from this case with prejudice.

Respectfully submitted,



---

Jacks C. Nickens  
State Bar No. 15013800  
NICKENS, KEETON, LAWLESS,  
    FARRELL & FLACK, L.L.P.  
600 Travis, Suite 7500  
Houston, Texas 77002  
(713) 571-9191 (phone)  
(713) 571-9652 (fax)

**Attorney-in-Charge for Defendants Cindy K. Olson, Lawrence Greg Whalley, Mark A. Frevert, Mark E. Koenig, Steven J. Kean, Richard B. Buy, Kenneth D. Rice, Richard A. Causey, Jeffrey McMahon, and Kevin P. Hannon**

OF COUNSEL:

Richard P. Keeton  
Paul D. Flack  
Bradley W. Hoover  
NICKENS, KEETON, LAWLESS,  
    FARRELL & FLACK, L.L.P.  
600 Travis, Suite 7500  
Houston, Texas 77002  
(713) 571-9191  
(713) 571-9652 (fax)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document has been served by sending a copy via electronic mail to serve@ESL3624.com on this the 18th day of June, 2003.

I further certify that a copy of the foregoing document has been served via Certified Mail/Return Receipt Requested on the following parties, who do not accept service by electronic mail on this the 18<sup>th</sup> day of June, 2003.

Thomas G. Shapiro  
Shapiro Haber & Urmy LLP  
75 State Street  
Boston, MA 02109  
Telephone: (617) 439-3939  
Facsimile: (617) 439-0134  
Attorneys for Plaintiffs van de Velde

Robert C. Finkel  
Wolf Popper LLP  
845 Third Ave.  
New York, NY 10022  
Telephone: (212) 759-4600  
Facsimile: (212) 486-2093  
Attorneys for Plaintiff van de Velde

William Edward Matthews  
Gardere Wynne Sewell LLP  
1000 Louisiana, Suite 3400  
Houston, Texas 77002  
Telephone: (713) 276-5500  
Facsimile: (713) 276-5555  
Attorneys for Defendants Anderson Worldwide, S.C.,  
Roman W. McAlindan and Philip A. Randall

Amelia Toy Rudolph  
Sutherland Asbill & Brennan LLP  
999 Peachtree Street, N.E., Ste. 2300  
Atlanta, GA 30309  
Telephone: (404) 853-8000  
Facsimile: (404) 853-8806  
Attorneys for Defendant Roger D. Willard

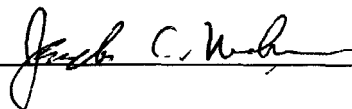
Gregory A. Markel  
Cadwalader, Wickersham & Taft  
100 Maiden Lane  
New York, New York 10038  
Telephone: (212) 504-6000  
Facsimile: (212) 504-6666  
Attorneys for Defendant Bank of America Corp.

Harvey G. Brown  
Orgain Bell & Tucker, LLP  
2700 Post Oak Blvd., Ste. 1410  
Houston, Texas 77056  
Telephone: (713) 572-8772  
Facsimile: (713) 572-8766  
Attorneys for Defendants Andersen-United Kingdom  
and Andersen-Brazil

Dr. Bonnee Linden, pro se  
1226 W. Broadway, P.O. Box 114  
Hewlett, NY 11557  
Telephone: (316) 295-7906

Carolyn S. Schwartz  
United States Trustee, Region 2  
33 Whitehall St., 2151 Floor  
New York, NY 10004  
Telephone: (212) 510-0500  
Facsimile: (212) 668-2255

Jacks C. Nickens



---